

The Appeals Board reviewed the record and adopts the stipulations listed in the Award with a clarification to stipulation no. 5 to reflect that Aetna was the insurance carrier on the beginning date of the alleged series of accidents but that coverage changed to Kemper as of January 1, 1994.

ISSUES

The Application for Review listed nature and extent of disability and compensability as the specific issues to be addressed. However, at oral argument it was announced by counsel for respondent and Kemper that the only issue for Appeals Board review was the nature and extent of claimant's disability, specifically, whether the claimant's work disability should be the 49.25 percent testified to by respondent's vocational expert or 57.75 percent which was alleged to be the split of the opinions given by claimant's and respondent's vocational experts, as opposed to the 64.5 percent found by the Special Administrative Law Judge.

Also at oral argument, counsel for respondent and Aetna announced that the date of accident was also an issue to be determined in this case. Claimant alleged he met with personal injury to his bilateral upper extremities and shoulders by accident on or about June 23, 1993, and each working day thereafter. The Special Administrative Law Judge found the accident date to be June 23, 1993, and consequently based his work disability award upon the "old act" definition of work disability. Counsel for respondent and Aetna alleged that because the accident is alleged as a series of each working day then claimant's accident date should be his last day worked of August 31, 1995, which would then make this a "new act" case. The date of accident would not only determine which version of K.S.A. 44-510e applies but, due to the respondent's change of insurance carriers on January 1, 1994, the date of accident also affects which insurance company's coverage applies to this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed and considered the briefs and arguments of the parties, the Appeals Board finds as follows:

Claimant started working for respondent on February 4, 1986, as a welder. He held this same job throughout his period of employment with respondent. In 1989 claimant started noticing problems with aches and pains in his hands which he reported to his supervisor. On June 23, 1993, he reported to Boeing Central Medical with bilateral upper extremity problems and was referred to James L. Gluck, M.D., who is a board-certified orthopedic surgeon in Wichita, Kansas. Dr. Gluck eventually performed surgeries to claimant's bilateral upper extremities. Claimant was released to return to work on June 19, 1995. Claimant performed essentially his regular job duties until August 31, 1995, when he was taken off work by Dr. Eugene E. Kaufman. Claimant remained unemployed at the time of his March 4, 1996, regular hearing testimony.

Dr. Gluck testified that he first saw claimant in June 1993 and did not see him again until May 1994. Dr. Gluck confirmed that claimant's symptoms of pain and discomfort had increased substantially from June 1993 to May 1994 and to the point where surgery was

necessary. After his release to return to work on June 19, 1995, claimant again performed his regular job duties although there appeared to be some accommodations made for his lower extremity problems which are unrelated to this docketed claim. Claimant described a gradual worsening of his condition during this period to the point where he could no longer perform his job duties. As a result of the worsening of his upper extremity problems he was sent by Boeing Central Medical to Dr. Kaufman who took claimant off work. He was not able to return to work with respondent and, although he has looked for other work, he remains unemployed as a result of his injuries.

Although the Award notes as stipulation no. 1 that claimant alleged a series of accidents beginning June 23, 1993, and continuing each working day thereafter, the Special Administrative Law Judge without explanation found June 23, 1993, to be the date of accident. The attorney for respondent and Aetna argued that claimant's accident date should be August 31, 1995, his last day worked rather than June 23, 1993, citing the "bright line rule" announced by the Court of Appeals in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). On the other hand, counsel for respondent and Kemper argues for an earlier accident date pursuant to the Court of Appeals decision in Condon v. The Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). Date of accident was clearly at issue.

In Condon, claimant's date of accident from a repetitive trauma case was found to be earlier than the last date worked because claimant did not leave work due to his injury and there was expert medical opinion testimony that claimant's condition did not worsen from his work activity after a certain date. Under the facts shown in this case, claimant's condition continued to worsen to the point where he could no longer continue to perform his job duties and claimant was required to stop working as a direct result of his bilateral upper extremity conditions. The Appeals Board finds the exceptions announced in Condon to the bright line rule of Berry are not analogous to the facts of this case and, accordingly, Condon does not apply. Pursuant to Berry, the date of accident in this case is found to be August 31, 1995, the last day claimant worked for respondent before leaving work due to his injuries. Therefore, claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e(a) which provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee, in the opinion of the physician, has lost the ability to perform work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

It is undisputed that claimant is not working. Therefore, the difference between the average weekly wage claimant was earning at the time of the injury and the average weekly wage claimant is now earning equals 100 percent. The second part of the above-quoted, two-part test for work disability is not so easily determined from the record. In addition to his bilateral upper extremities injuries which are the subject of this docketed claim, claimant had multiple injuries to his lower extremities which were the subject of two other docketed claims.

All three docketed claims were litigated together. Therefore, the record developed and presented in this case was likewise the record for the injuries claimed in Docket Nos. 190,874 and 198,045. Although five different medical doctors testified in this case, only one, Dr. Schlachter, gave an opinion regarding claimant's loss of task performing ability attributed to the upper extremity injuries only and which did not include the lower extremities which were the subject of the other docketed claims. No appeal was taken from the awards entered in Docket Nos. 190,874 and 198,045. Accordingly, the Appeals Board is concerned only with the claimant's loss of tasks performing ability from the bilateral upper extremity injuries in Docket No. 186,194.

Two vocational experts, Karen Terrill and James Molski, testified concerning claimant's 15-year employment history and the work tasks claimant performed during that time period. Ernest R. Schlachter, M.D., performed an independent medical examination of claimant at the direction and request of the Administrative Law Judge. In his report which is Exhibit 2 to the Schlachter deposition, Mr. Molski lists as "Appendix A" to his report "Job Tasks Performed in the Relevant Fifteen Year Period Prior to Reported Injury." Thereafter he lists as "Appendix D" the "Job Tasks Likely Contraindicated with Restrictions from Dr. Schlachter." Mr. Molski testified that he considered the restrictions recommended by Dr. Schlachter and after applying those to the list of all of claimant's job tasks for each of the jobs he performed in the 15 years next preceding claimant's accident, came up with a list of those tasks which were outside Dr. Schlachter's restrictions. It was this "Appendix D" to which Dr. Schlachter was referring at page 8 of his deposition testimony where, after reviewing the report by Mr. Molski, Dr. Schlachter was asked the following questions and gave the following answers:

"Q. Okay. Did you review those tasks that Mr. Molski enumerated in the last -- in the second-to-the-last and third-to-the-last pages of Deposition Exhibit 2 to -- and make your indication as to whether Mr. Anderson could perform those job tasks?"

"A. Yes, sir."

"Q. And what is your opinion with regard to his performance of those job tasks?"

"A. He's not able to do any of them."

"Q. Okay. Could you tell us, Doctor, what your opinion [is] as to the amount of percentage loss of job tasks Mr. Anderson has as a result of his upper extremity injuries on the job at Boeing?"

"A. 100 percent."

"Q. And would that be for the 15 years preceding his injuries at Boeing?"

"A. Yes, sir."

Therefore, when Dr. Schlachter testified that claimant had lost 100 percent of the job tasks listed in "Appendix D," his opinion was not, as counsel for claimant contends, an opinion of a 100 percent tasks loss. Rather, it shows that Dr. Schlachter was in total agreement with Mr. Molski's opinion as to which tasks claimant could no longer perform out of the total number of tasks listed. For example, "Appendix A" lists seven tasks for the welder job. "Appendix D" lists five tasks which claimant can no longer perform. Accordingly, claimant has lost the ability to perform five out of seven tasks required for the job of welder, which represents a 72 percent loss of tasks performing ability. Continuing down the list, Dr. Schlachter agreed that claimant had lost four of the six tasks listed for a cook/club worker or 67 percent. He lost four out of seven tasks of a police officer/law enforcement worker or 57 percent and two out of four of a park ranger or 50 percent. Altogether, claimant lost 15 out of the 24 tasks Mr. Molski identified from the four jobs claimant had held during the relevant 15-year period. This represents a 62.5 percent loss of tasks performing ability.

However, during cross-examination, Dr. Schlachter admitted that at least two of the tasks he included among those which claimant could no longer do as a result of his upper extremity injuries were, in fact, eliminated due to restrictions against prolonged walking and standing which were issued as a result of claimant's lower extremity conditions. As we are only concerned with claimant's upper extremities in this case, those two tasks should be added back with those which the claimant can still perform. Also, there were an additional two job tasks which were either too vague or which would require additional information for Dr. Schlachter to conclusively say claimant would be unable to perform them. Thus, claimant did not meet his burden of proving that his ability to perform these tasks was actually lost. Dr. Schlachter further testified that some tasks, particularly those pertaining to welding, could be performed in part or to some extent, depending upon the weight of the materials involved. Nevertheless, overall it was apparent that these tasks were substantially outside claimant's restrictions and were therefore properly eliminated. Therefore, if we delete the four tasks which Dr. Schlachter testified claimant could not do during his direct examination but concerning which he recanted his opinion on cross-examination, it results in a loss of 11 of 24 tasks or 46 percent. This is the percentage of tasks the Appeals Board finds claimant has lost as a result of his bilateral upper extremity injuries. Averaging the 100 percent wage loss with the 46 percent loss of tasks performing ability results in a work disability of 73 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge dated should be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Donald E. Anderson, and against the respondent, The Boeing Company, and its insurance carriers, Aetna Casualty & Surety Company and Kemper Insurance Company, for an accidental injury which occurred August 31, 1995, and based upon an average weekly wage of \$1,232.32 for 42 weeks of temporary total disability compensation at the maximum weekly rate in effect at the time for which such payments are due, followed by 283.24 weeks of permanent partial disability compensation at

the rate of \$326 per week or \$92,336.24, for a 73% permanent partial disability, with the total award not to exceed \$100,000.

Aetna Casualty & Surety Company is only liable for temporary total disability and medical benefits provided claimant prior to the date of termination of its coverage.

As of February 25, 1997, there is due and owing claimant 27 weeks of temporary total disability compensation at the rate of \$299 per week followed by 15 weeks of temporary total disability compensation at the rate of \$313 per week or \$12,768, followed by 35.71 weeks of permanent partial compensation at the rate of \$326 per week, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance is to be paid for 247.53 weeks at the rate of \$326 per week, until the \$100,000 maximum benefit is fully paid or until further order of the Director.

All other orders by the Special Administrative Law Judge are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above orders.

IT IS SO ORDERED.

Dated this ____ day of February 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Wichita, KS
Frederick L. Haag, Wichita, KS
Kelly W. Johnston, Wichita, KS
David M. Druten, Kansas City, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director